

Multilateral CSA Staff Notice 51-338
*Continuous Disclosure and Prospectus Requirements Relating to
Documents Prepared Under the U.S. Securities and Exchange Act of
1934*

March 7, 2013

Purpose

This CSA staff notice is published by the following jurisdictions: Saskatchewan, Manitoba, Ontario, Québec, New Brunswick, Prince Edward Island, Nova Scotia, Newfoundland and Labrador, Yukon, Northwest Territories and Nunavut. This notice provides information about continuous disclosure and prospectus requirements applicable to documents that are schedules or exhibits to, or incorporated by reference in, disclosure documents prepared in accordance with the United States *Securities and Exchange Act of 1934* (the 1934 Act) and filed in Canada.

Filing requirements under continuous disclosure rules

National Instrument 51-102

National Instrument 51-102 *Continuous Disclosure Obligations* (NI 51-102) has certain provisions that apply to reporting issuers that are SEC issuers (as defined in that rule).

In particular, the definition of annual information form (AIF) in NI 51-102 allows SEC issuers to file as an AIF an annual report under the 1934 Act on Form 10-K or Form 20-F (a 1934 annual report). A 1934 annual report may contain various schedules and exhibits, as well as documents incorporated by reference, all of which form part of the 1934 annual report.

- Staff have noted that certain SEC issuers filing a 1934 annual report in Canada do not include in their SEDAR filings all schedules and exhibits to, or documents incorporated by reference in, the 1934 annual report.
- An SEC issuer filing a 1934 annual report in Canada as its AIF must also file all schedules and exhibits to, and documents incorporated by reference in, the 1934 annual report.

Furthermore, section 11.1 of NI 51-102 requires a reporting issuer that is an SEC issuer to file a copy of any disclosure material that it files with, or furnishes to, the U.S. Securities and Exchange Commission (SEC) under the 1934 Act. This includes material filed as exhibits to other documents, if the material contains information that has not been included in disclosure already filed in Canada by the SEC issuer. Staff have noted that certain SEC issuers do not comply with this requirement.

National Instrument 71-102

Part 4 of National Instrument 71-102 *Continuous Disclosure and Other Exemptions Relating to Foreign Issuers* (NI 71-102) contains certain exemptions that apply to reporting issuers that are SEC foreign issuers (as defined in that rule).

In particular, Part 4 of NI 71-102 allows an SEC foreign issuer to satisfy certain continuous disclosure obligations under NI 51-102 by filing in Canada a copy of certain disclosure documents that it files with, or furnishes to, the SEC.

- Staff have noted that certain SEC foreign issuers filing a U.S. disclosure document in reliance on an exemption in Part 4 do not include in their SEDAR filings all schedules and exhibits to, or documents incorporated by reference in, the U.S. disclosure document.
- An SEC foreign issuer filing a U.S. disclosure document in Canada in reliance on an exemption in Part 4 must also file all schedules and exhibits to, and documents incorporated by reference in, the U.S. disclosure document.

Incorporation by reference requirements under short form prospectus rule

If an SEC issuer uses its 1934 annual report as an AIF in Canada, the 1934 annual report must be incorporated by reference in any short form prospectus filed under National Instrument 44-101 *Short Form Prospectus Distributions* (NI 44-101), as required by item 11 of Form 44-101F1 *Short Form Prospectus*.

- Staff have received questions from issuers as to whether it is possible not to incorporate by reference certain portions of, or schedules and exhibits to, a 1934 annual report that are not required in an AIF prepared under Form 51-102F2 *Annual Information Form*.
- The requirement to incorporate a document by reference under item 11 of Form 44-101F1 applies to the entire document, including schedules and exhibits to, and documents incorporated by reference in, the document.

Filing schedules, exhibits and documents incorporated by reference on SEDAR

When an SEC issuer files a 1934 annual report or other U.S. disclosure document on SEDAR, the issuer may comply with the above requirements by filing the schedules, exhibits and documents incorporated by reference as:

- attachments to the version of the 1934 annual report or other disclosure document that is filed on SEDAR (i.e., as one single document under the appropriate document type),
- a single filing under the document type “Other” in the same SEDAR project, or
- separate filings under the document type “Other” in the same SEDAR project.

However, if annual financial statements, annual MD&A, a management information circular, a material contract or other specific continuous disclosure document required by NI 51-102 has already been filed under the appropriate document type in the “Continuous Disclosure” category on SEDAR, it is not necessary to re-file them with the 1934 annual report if they are incorporated by reference into that 1934 annual report.

Furthermore, an SEC issuer that files a 1934 annual report may incorporate by reference all or part of a document that was previously filed on SEDAR as part of a 1934 annual report for a previous year.

Regardless of which of the above methods is followed for a 1934 annual report or other U.S. disclosure document filed on SEDAR, we suggest that SEC issuers file a “notice to public” under the document type “Cover Letter” in the same SEDAR submission indicating where the schedules, exhibits and documents incorporated by reference can be found (e.g., by referring to the date of filing on SEDAR).

Exemptive relief

We have granted exemptive relief to certain SEC issuers that made submissions on why they should not be required to:

- file in Canada certain schedules and exhibits to, or documents incorporated by reference in, a U.S. disclosure document, or
- incorporate those materials by reference into a short form prospectus.

Staff will consider applications for exemptive relief on a case-by-case basis. If an SEC issuer seeks exemptive relief in respect of certain schedules or exhibits required to be filed with or furnished to the SEC, staff will consider a number of factors, including whether the schedules and exhibits:

- consist of documents that only have to be filed under a specific requirement of U.S. securities legislation that has no equivalent in Canada, or
- contain material information that the issuer is required to disclose under Canadian securities legislation, including NI 51-102 or NI 44-101.

French language requirements under Québec legislation

If an issuer files a short form prospectus in Québec, section 40.1 of the *Securities Act* (Québec) requires that the prospectus, as well as any document required to be incorporated by reference in the prospectus, be drawn up in French or in French and English. Accordingly, any 1934 annual report or other document prepared in accordance with the 1934 Act that is incorporated by reference in a short form prospectus filed in Québec (including all schedules and exhibits to, and documents incorporated by reference in, the 1934 annual report or other document), must be drawn up in French or in French and English, unless exemptive relief from section 40.1 is granted by the Autorité des marchés financiers (AMF).

Questions

Please refer your questions to any of the following people:

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